



Washington, D.C. 20520

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SECRETMEMORANDUM

TO: D/LOS - John Norton Moore
FROM: D/LOS - Roger H. Hull ^{MR}
SUBJECT: Analysis of Dispute Settlement Text

An analysis of the negotiating text on dispute settlement differs from the analyses of the negotiating texts in Committees I, II, and III, since a single text was not produced by the dispute settlement working group. Instead, as a result of French, Latin, and Soviet opposition to the comprehensive approach (Annex I), the text consists of four agreed articles, two alternate annexes on the remaining articles for a dispute settlement chapter, and an annex dealing with information and consultation provisions.

If the comprehensive procedure set forth in the four agreed articles and Annex I (Articles 5 to 17) were ultimately adopted, it would clearly be acceptable to us. Unfortunately, however, the adoption of the comprehensive approach is unlikely unless we can split the French-Latin-Soviet opposition which developed during Geneva. While that opposition was uncoordinated since each party had a different objective in opposing the comprehensive formula--the French because they wanted dispute settlement for fish, pollution, and science; the Latins because they objected to dispute settlement in the economic zone; and the Soviets because they wanted to have dispute settlement only for deep seabed and fisheries issues--it was effective. The main problem, therefore, is to prevent the continued French-Latin-Soviet support for the functional approach (Annex II). We must therefore overcome their opposition--either by convincing a sufficient number of delegations to support the comprehensive procedure or by fusing the comprehensive and functional approaches. With respect to the latter

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idea, we might develop an acceptable compromise by amending Article 11 to provide for separate (but appealable) decisions in the deep seabed, fisheries, pollution, and scientific research areas.

Despite the acceptability of Annex I to us, we must recognize that there are, in effect, four unresolved problems:

1. We can expect Lauterpacht to renew his efforts to strengthen the conciliation provisions (Article 7);
2. We must brace ourselves for Canadian-French-Japanese-Latin-Soviet efforts to undo the Montreux compromise and delete any reference to the LOS Tribunal (Article 9);
3. We must remember, as the footnote indicates, that there was considerable opposition to the inclusion of a provision on the release of vessel, crew, and passengers (Article 15); and
4. We should recognize that the Latins will undoubtedly attempt to limit the "limits its acceptance" language of Article 17; the Australians and Dutch--with assistance from the Latins and Swiss--may well try to delete the exception for military activities; and various delegations--including perhaps the US--may wish to examine the need for and advisability of the boundary delimitation and Security Council exceptions (it should be noted that, with respect to the boundary delimitation exception, Articles 61 and 70 of the Committee II text would appear to be inconsistent with the idea of a boundary delimitation exception).

We must also be prepared to deal with Latin efforts to reverse the Article 17 approach and provide instead for a general exclusion for dispute settlement within the economic zone, subject to specific, enumerated exceptions.

Aside from these potential problems, we will have to develop a rationale for a procedure for electing Tribunal members which protects our interests (Article

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4 of Annex IC). Moreover, we must develop--and sell--tighter timeframes for special procedures, since, under the procedure outlined in Annex II, time would appear to be needlessly wasted (and such procedures do not even contemplate the additional time which will be required for appeals). Finally, we should discourage--quietly, so as not to irritate Lauterpacht--the provisions in Annex III for information and consultation, since such provisions present a tactical risk that we will lose binding dispute settlement, complicate our attempts to get a military exemption, and, in many cases, simply add time and cost to the proposed dispute settlement procedure.

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